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IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

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COURT OF CRIMINAL APPEALS
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LANNY MARVIN BUSH,

Appellant

v.

THE STATE OF TEXAS,

Appellee

STATE'S BRIEF ON THE MERITS AFTER GRANTING OF DISCRETIONARY REVIEW SUBMITTED BY THE COLEMAN COUNTY DISTRICT ATTORNEY'S OFFICE AND THE 35TH DISTRICT ATTORNEY'S OFFICE

ELEVENTH COURT OF APPEALS CAUSE NO. 11-14-00129-CR

42ND DISTRICT COURT CAUSE NO. 2602

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ORAL ARGUMENT HAS NOT BEEN PERMITTED BY THE COURT

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Pursuant to Rule 74(a) of the Texas Rules of Appellate Procedure the State lists the names and addresses of all parties to the Trial Courts final judgment and their trial counsel in the trial court.

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   - speculating on evidence that was not offered by the State, and
   - speculating on a hypothesis that was inconsistent with the defendant's guilt,

   during its' review of the sufficiency of the evidence to support a capital allegation that Appellant committed murder while in the course of kidnapping or attempting to kidnap the victim?

2. In considering the "grey area" of criminal attempt law between acts that are simply mere preparation to commit an offense and acts that tend to effect the commission of an offense, may a reviewing court reject a jury's verdict during a sufficiency of the evidence review simply because the reviewing court would have drawn the "imaginary line" in a different location than the jury?

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STATE'S BRIEF ON THE MERITS AFTER GRANTING OF DISCRETIONARY REVIEW SUBMITTED BY THE COLEMAN COUNTY DISTRICT ATTORNEY'S OFFICE AND THE 35TH DISTRICT ATTORNEY'S OFFICE

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Comes now the State and respectfully requests that this Court consider the following grounds in which the Eleventh Court of Appeals erred in finding the evidence insufficient to support Appellant's conviction for Capital Murder:

STATEMENT OF THE CASE

Appellant's Past Relationship with the Victim

Appellant and Michele Reiter, the victim, dated and lived together for several years. R.R. Vol. 4, pp. 15-18, 22, 28.

During their relationship, Appellant and Reiter had a lot of difficulties. R.R. Vol. 4, pp. 19, 22-23. Appellant was unable to keep a job which put a financial burden on the couple. R.R. Vol. 4, pp. 19-20. Appellant also was very controlling of Michele, accusing her of cheating on him even though he continued to visit online dating websites. R.R. Vol. 4, pp. 19-22.

Appellant was so controlling that Michele left her phone at her friend's house on one occasion so that Appellant would not know where she went. R.R. Vol. 4, p. 21.

Over the course of the years before she was killed, Michele attempted to leave Appellant at least four to five and possibly as many as six times. R.R. Vol. 4, pp. 23-24. In 2011, Michele even moved out to live with a friend for four days. R.R. Vol. 4, p. 23.

Summer and Fall of 2012

On July 2nd and 4th of 2012, Appellant conducted numerous internet searches for phrases such as: "knockout drops unconscious fast," "natural knock

out drop," "how to make homemade knockout drops," and "how to drug someone to sleep." State's Exhibits 44-52.

Finally on August 24, 2012, Michele again moved out of the residence she shared with Appellant and began living with a friend. R.R. Vol. 4, p. 27.

A few days later, on the 28th, Michele went back to Appellant's residence to pick up some of her belongings. R.R. Vol. 4, pp. 31-32. While she was there, Appellant called the police and had Michele wrongfully arrested for a domestic violence offense that she did not commit. R.R. Vol. 4, pp. 31-33. Michele completely ended her romantic relationship with Appellant because of the arrest. R.R. Vol. 4, pp. 39-40.

The day after the arrest, Appellant hacked into Michele's phone and email and facebook accounts. R.R. Vol. 4, pp. 35-37; R.R. Vol. 5, p. 45. Because of whatever Appellant did, Michele's phone no longer worked, and she was unable to access her email or facebook accounts. R.R. Vol. 4, p. 35. Michele had to buy a new phone and set up completely new accounts to solve the problem. R.R. Vol. 4, pp. 35-37.

Michele's friend warned her to be careful of Appellant because of the escalation of the harassment. R.R. Vol. 4, p. 40. Michele promised to take someone with her if she had to meet Appellant face-to-face. R.R. Vol. 4, p. 40.

By the next day, the 30th, Appellant had created a fake facebook account under the name "Rocky Switzer" to contact Michele. R.R. Vol. 4, pp. 37-39. Appellant presented "Rocky Switzer" as a high school friend of Michele's. R.R. Vol. 4, p. 38.

On September 3, 2012, Appellant conducted another internet search for "complaint home depot regional." State's Exhibit 58. Michele was employed at this time by Home Depot. R.R. Vol. 5, p. 20. At some point after Michele left Appellant, Appellant did in fact make a complaint with Home Depot against Michele claiming that she threw a pipe at him in the store. R.R. Vol. 5, pp. 22-23. Home Depot investigated these allegations and found them to be not true. R.R. Vol. 5, p. 23.

On September 8, 2012, Michele received a voicemail message on her phone from Appellant. R.R. Vol. 4, pp. 41, 92-93; R.R. Vol. 5, p. 12. Appellant sounded crazy in the message, telling Michele that:

> …she needed to be really careful. She shouldn't go anywhere that night, that there were people watching her, that they were really bad people and that they were the kind of people that would put drugs in her drink and would hurt her…. R.R. Vol. 4, p. 93.

Late that same night, Appellant drove past the residence where Denise and Michele were living. R.R. Vol. 4, pp. 41-42.

Because of all of the harassment, Michele and her friend set up an arrangement where if the friend did not hear from Michele for a certain period of time, the friend would call the police. R.R. Vol. 4, pp. 87-88.

At some point a few weeks prior to Michele's disappearance, Appellant asked his nephew where about where a .32 caliber gun belonging to a family member was located. R.R. Vol 6, pp. 182-83.

September 10th, 2012

Appellant described his actions toward Michele during the week leading up to September 10th as making Michele's life "a living hell." R.R. Vol. 5, p. 45. On the 10th, Appellant's entire focus was on his plan to get revenge on Michele.

Appellant had used the "Rocky Switzer" account to set up a date with Michele for the 10th at 8:30 p.m. R.R. Vol. 4, p. 44. Appellant set up this date because he "wanted to see Michele fall on her face when she got stood up by Rocky." R.R. Vol. 5, p. 49.

Appellant was living in San Angelo, Texas at that time. *See* R.R. Vol. 5, pp. 42, 50. However, Appellant drove to Brown County well before 8:30 to contact the wife of a man that Michele had been having an affair with. R.R. Vol. 5, pp. 49-51. Appellant told the woman about her husband's unfaithfulness with Michele. R.R. Vol. 4, pp. 50-51; R.R. Vol. 5, pp. 37, 49-50.

Then at 3:13 p.m., while still in Brown County, Appellant bought a rare caliber of ammunition - .32 caliber. R.R. Vol. 6, p. 32, 76-79, 168-79.

Appellant also attempted to get Michele to meet with him by promising to give Michele more of her belongings that she had left when she moved out. R.R. Vol. 4, pp. 54-55.

Michele was last seen alive at 6:15 p.m. when she left her friend's house to get headache medicine and go to meet "Rocky" for their date. R.R. Vol. 4, pp. 53-54. At about this time, cell phone records showed that Appellant called Michele's phone. R.R. Vol. 6, p. 61.

Cell phone records also showed that Appellant's and Michele's phones were then together in the same geographic locations from 6:33 p.m. until 8:55 p.m. when Michele's phone was shut off. R.R. Vol. 7, pp. 18-31. During this time, the records showed that they traveled along the same rural roads until they reached the extremely rural location in Coleman County where Michele's body was ultimately found buried in a shallow grave surrounded by weeds and brush. R.R. Vol. 7, pp. 25-29, 53-61; State's Exhibit 75.

Appellant then used Michele's phone at 7:56 p.m. to text her friend a message. R.R. Vol. 4, pp. 55-58; R.R. Vol. 6, p. 62; R.R. Vol. 7, p. 36; State's Exhibit 1. The final location that Michele's phone pinged at prior to being shut off at 8:55 p.m. was at Michele's grave site. R.R. Vol. 7, p. 31.

Appellant then returned to San Angelo that evening. R.R. Vol. 7, pp. 28-29.

After Michele's Disappearance

The day after Michele disappeared, Appellant conducted yet another internet search. *See* State's Exhibit 62. During this search, Appellant typed in the phrases "where is the heart in the human body" and "where is [sic] the lungs in the human body." State's Exhibit 62. Appellant also drove back from his home in San Angelo to the area where Michele's body was ultimately found. R.R. Vol. 7, pp. 30-32.

Two days after Michele disappeared, Appellant called the law enforcement center asking for confirmation that Michele was missing. R.R. Vol. 5, p. 44. That same day, Appellant told Michele's friend that he had harassed Michele so much because "he just wanted to hurt her as bad as she had hurt him." R.R. Vol. 4, p. 33.

On September 19th, Appellant himself used the word "abduction" when discussing Michele's disappearance. R.R. Vol. 4, p. 74; R.R. Vol. 9, State's Exhibit 2.

Michele's vehicle was found parked at a sports complex in Brown County. R.R. Vol. 5, pp. 64-65. There was no evidence that Michele was killed at the location where her car was found. R.R. Vol. 5, pp. 64-69.

Michele's body was recovered several days later in Coleman County in a rural area south of U.S. 67 on Farm to Market Road 1026. R.R. Vol. 5, pp. 54-55; R.R. Vol. 7, pp. 54-56. Her body had been buried in a shallow grave in the center of a dry creek bed. R.R. Vol. 5, p. 56; R.R. Vol. 7, p. 56. She had been buried with no clothing on. R.R. Vol. 7, p. 101.

Michele's body had decomposed so much that fingerprint comparison and a distinctive tattoo match were required to identify her. R.R. Vol. 5, pp. 57-58. However, the coroner was able to determine that Michele had not been shot. R.R. Vol. 7, pp. 82, 103, 105, 111-12.

STATEMENT OF PROCEDURAL HISTORY

Appellant was indicted for the Capital Murder of Michele Reiter by means unknown while in the course of committing or attempting to commit the offense of kidnapping. C.R. p. 9.

On August 11, 2016, the Eleventh Court of Appeals held that the evidence was insufficient to support the capital allegation that the offense was committed while in the course of committing or attempting to commit the offense of kidnapping. *Bush v. State*, No. 11-14-00129-CR, 2016 WL 4385896, at *7 (Tex. App.—Eastland Aug. 11, 2016, pet. granted) (Mem. Op., not designated for publication). The Court then reversed the capital murder conviction, and based

upon its finding that the evidence was sufficient to support a murder conviction, remanded the case to the trial court for a new punishment hearing. *Id.* at *8.

Both the State and Appellant filed Motions for Rehearing. Both motions were denied by the court of appeals on September 15, 2016.

Both Appellant and the State also filed Petitions for Discretionary Review. On January 11, 2017, this Court denied Appellant's Petition for Discretionary Review and granted the State's Petition for Discretionary Review.

GROUNDS FOR REVIEW

1. In reviewing sufficiency of the evidence, did the court of appeals err by:
    - failing to consider any reasonable inferences that could be drawn from the evidence,
    - separating evidence about the crime scene from evidence about the relationship between Appellant and the victim as a whole,
    - speculating on evidence that was not offered by the State, and
    - speculating on a hypothesis that was inconsistent with the defendant's guilt,

    during its' review of the sufficiency of the evidence to support a capital allegation that Appellant committed murder while in the course of kidnapping or attempting to kidnap the victim?
2. In considering the "grey area" of criminal attempt law between acts that are simply mere preparation to commit an offense and acts that tend to effect the commission of an offense, may a reviewing court reject a jury's verdict during a sufficiency of the evidence review simply because the reviewing court would have drawn the "imaginary line" in a different location than the jury?

ARGUMENT & AUTHORITIES – GROUND ONE

The proper sufficiency of the evidence standard of review is axiomatic for appellate courts: view the evidence in the light most favorable to a verdict to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Moreno v. State*, 755 S.W.2d 866, 867 (Tex. Crim. App. 1988) (en banc). However, the danger in an axiomatic law is that it becomes a rule which is often cited yet rarely seriously considered. *Id.*

The Eleventh Court of Appeals' decision erred by citing to the axiomatic law governing a sufficiency review without seriously considering the implications of those laws. Proper deference for the appropriate standard of review leads to the conclusion that the Eleventh Court of Appeals erred in finding the evidence insufficient to support the capital allegation.

Reasonable Inferences

A reviewing court should consider the *combined and cumulative* force of all admitted evidence, *including all reasonable inferences therefrom*, in the light most favorable to the conviction. *Ramsey v. State*, 473 S.W.3d 805, 808 (Tex. Crim. App. 2015) (emphasis added).

Jackson and its progeny also unambiguously instruct a reviewing court faced with a record of historical facts that support conflicting inferences to presume – even if it does not affirmatively appear in the record – that the trier of fact resolved any such conflicts in favor of the prosecution and to defer to that resolution. *See Cavazos v. Smith*, 565 U.S. 1, 7 (2011).

Inferences from Appellant's Relationship with Michele

The Eleventh Court of Appeals erred by failing to consider any reasonable inferences[1] that could be drawn from the testimony about the nature of the relationship between Michele and Appellant. The Eleventh Court held that "…*without evidence* that [Michele] was moved from one place to another or confined without consent prior to her death, *a rational juror could not believe beyond a reasonable doubt that Appellant kidnapped [Michele]* from the sports complex." *Bush v. State*, No. 11-14-00129-CR, 2016 WL 4385896, at *6 (Tex. App.—Eastland Aug. 11, 2016, pet. granted) (Mem. Op., not designated for publication) (emphasis added).

[1] The only inference discussed in the whole opinion is the inference that Appellant was the last person to see the victim alive and returned to Michele's grave the morning of the 11th. *See Bush v. State*, No. 11-14-00129-CR, 2016 WL 4385896, at *8 (Tex. App.—Eastland Aug. 11, 2016, pet. granted) (Mem. Op., not designated for publication). However, these inferences are only discussed during the sufficiency review for the lesser-included offense of murder conducted by the court of appeals. *See id.*

A person commits the offense of kidnapping if he intentionally or knowingly abducts another person. Tex. Pen. Code §20.03(a) (West 2015). Abduct means to restrain a person with intent to prevent his liberation by (1) secreting or holding him in a place where he is not likely to be found; or (2) using or threatening to use deadly force. Tex. Pen. Code §20.01(2) (West 2015).

Restrain means to restrict a person's movements without consent, so as to interfere substantially with the person's liberty, by moving the person from one place to another or by confining the person. Tex. Pen. Code §20.01(1) (West 2015). Restraint is considered to be without consent if it is accomplished by force, intimidation, or deception. Tex. Pen. Code §20.01(1)(A) (West 2015).

Although there may not be direct evidence that Michele was moved or confined, there certainly was circumstantial evidence and reasonable inferences from that circumstantial evidence that Michele was either moved or confined.

Michele was afraid of Appellant and had promised her friend not to meet Appellant alone in a private place. *See* R.R. Vol. 4, p. 55; R.R. Vol. 5, pp. 20, 24. The State also presented evidence of the changing nature of the relationship between Appellant and Michele – September 10th did not occur in a vacuum. Rather, September 10th was the culmination of Michele's attempts to cut all ties with Appellant and Appellant's attempts to retain control of Michele at any cost.

A rational juror could reasonably infer from Michele's fear, her agreement with her roommate, and the development and progression of the relationship that Appellant used any means possible, including lying about returning her property and/or holding her at gunpoint, to lure or confine Michele to the sports complex and then either prevent her from leaving the sports complex alive or force her to leave with him.[2]

Importantly, it is not necessary that a kidnapping victim be held for any certain length of time. *Clark v. State*, 24 S.W.3d 473, 477 (Tex. Crim. App. 2000). The requirement of secreting a victim where she will likely not be found is part of the *mens rea* of the offense, not the *actus reas*. *Id.* at 476.

Therefore, the evidence does not have to show that Michele was kidnapped for an extensive period of time or transported all the way from the sports complex to the gravesite against her will. Rather, the jury only needed to believe that Appellant's restraint of Michele was a substantial interference with her liberty and that Appellant had the requisite *mens reas*.

The Eleventh Court dismisses the State's arguments about these inferences that should be drawn with the claim that:

[2] The Eleventh Court of Appeals' continual references to facts and inferences that do not favor the prosecution instead of focus on these facts that do favor the prosecution demonstrate the error of their reasoning. A court's recitation of inconsistencies in testimony can be evidence that the court failed to view the evidence in the light most favorable to the prosecution. *See McDaniel v. Brown*, 558 U.S. 120, 130 (2010).

> …[T]he evidence shows that Reiter met with Appellant in a remote location – the sports complex. There is no evidence that the meeting at the sports complex was against Reiter's will. Likewise, the record does not indicate whether [Michele] left the sports complex willingly with Appellant or whether [Michele] was even still alive when she left the sports complex. In addition, although the State argues that there is no evidence that [Michele] was killed at the sports complex, there is also no evidence that [Michele] was killed at the burial site or in Appellant's vehicle. *Bush*, 2016 WL 4385896, at *6.

However, this section of the Court of Appeals' decision presents several errors: (1) even assuming that Michele did willingly go to the sports complex, there is an important logical distinction between willingly going to meet someone to pick up property[3] and then getting in a vehicle to drive away from that location with them; (2) none of the statements view the evidence or the reasonable inferences in the light most favorable to the conviction; (3) the Court failed to resolve conflicting inferences in favor of the prosecution; (4) the Court speculated on evidence that was not offered by the State;[4] and (5) the Court speculated on a hypothesis that was inconsistent with the defendant's guilt.[5]

[3] Appellant admits in his interview that he used this ruse to deceive Michele into meeting with him even though he did not bring at least one of the promised items with him. R.R. Vol. 6, pp. 68-69.

[4] Separating out each piece of evidence offered to support a conviction and speculating on evidence the State did not present is also not a proper method of conducting a sufficiency review. See *Merritt v. State*, 368 S.W.3d 516, 526 (Tex. Crim. App. 2012).

[5] Both the Supreme Court and this Court have clearly rejected the analytical construct that a conviction can only be upheld if every other reasonable hypothesis raised by the evidence was negated save and except the guilt of the defendant. See *Holland v. U.S.*, 348 U.S. 121, 139-40 (1954); *Jackson v. Virginia*, 443 U.S. 307, 326 (1979); *Ramsey v. State*, 473 S.W.3d 805, 808 fn.3 (Tex. Crim. App. 2015).

Importantly, the Court of Appeals equates the possibility that Michele may have gone willingly to a *sports complex* with the possibility that she went to her *burial site* willingly. *See id.* ("Although the State argues that Reiter would not go with Appellant to *a rural location—her burial site*, the evidence shows that Reiter met with Appellant in *a remote location—the sports complex*." Emphasis added).

This error puts into stark relief why a reviewing court must not supplant a jury verdict and why this Court has repeatedly warned against making a "myopic determination of guilt from reading a cold record." *See Moreno v. State*, 755 S.W.2d 866, 867 (Tex. Crim. App. 1988) (en banc).

By reading the cold record, the appellate court equated two locations that are completely different. The location where Michele was buried was an extremely rural area covered with brush, grass and weeds under a bridge in Coleman County. *See* R.R. Vol. 7, pp. 53-61; State's Exhibit 75. The sports complex where Michele's car was found was in the parking lot of a softball complex center called the "Bert Massey sports complex" and was across the street from the Gordon Wood football stadium and a water complex. R.R. Vol. 4, p. 83; R.R. Vol. 5, p. 33.

Although the record describes the sports complex as a "remote" location, and the State questioned whether Michele was voluntarily at the sports complex, to equate those two places – such that voluntary presence at one location is used as

support for finding that a person was voluntarily at the other location – is a non sequitur.

In addition to the differences between these two locations geographically, the Eleventh Court's claim that Michele may have willingly gone to both places ignores why Michele would have voluntarily gone to the sports complex to meet Appellant and the reasonable inferences that motivation implies.

The record shows that Appellant was using Michele's property to attempt to get Michele to meet with him. R.R. Vol. 4, pp. 54-55; R.R. Vol. 6, pp. 68-69. Even assuming that Michele willingly went to meet Appellant at the sports complex to get her property back, that would not have provided her with any motive to get into a vehicle and leave that location with him, particularly in light of how afraid she was of him.

To fail to consider these inferences is to treat Michele and Appellant as acquaintances who would interact in a congenial, almost friendly manner. However, such a view of their relationship runs completely counter to the true nature of their relationship.

Appellant's own statements after Michele disappeared give even more weight to the belief that Appellant not only kidnapped Michele, but that he may have held her for a long period of time before killing her. Appellant admitted that "he just wanted to hurt [Michele] as bad as she had hurt him." R.R. Vol. 4, p. 33.

A rational inference from this statement is that he did not want to kill Michele quickly. When coupled with the facts that: (1) Appellant and Michele's cell phones were together for two hours after Michele met Appellant; (2) there was no longer an on-going romantic relationship; and (3) Appellant lied to police and claimed that he and Michele had consensual sex during that two hour time period, it would certainly not be outrageous to believe that Appellant held Michele without her consent to make her suffer before he killed her. *See* R.R. Vol. 6, p. 60; R.R. Vol. 7, pp. 18-31; State's Exhibits 17-19.

The jurors, by their verdict, believed that Michele had been restrained in some manner. A reviewing court must uphold this conviction unless the verdict was so outrageous that no rational trier of fact could agree. *See Cavazos v. Smith*, 132 S.Ct. 2, 4 (2011); *Merritt v. State*, 368 S.W.3d 516, 527 (Tex. Crim. App. 2012); *Wirth v. State*, 361 S.W.3d 694, 698 (Tex. Crim. App. 2012). Based upon the facts presented, it is not outrageous to believe that Michele was either lured under false pretenses to the sports complex or that once she was there, Appellant used force or intimidation to confine her there[6] where she could not leave or to move her to another location where he killed her.

[6] Kidnapping does not require that Appellant move Michele while she was alive from the sports complex to another site where she was killed. If the evidence is sufficient to show that Appellant confined Michele at the sports complex, that is likewise sufficient to show kidnapping.

If I juror could rationally reach this conclusion, the Eleventh Court of Appeals' decision to find the evidence insufficient was erroneous.

Inferences from the .32 caliber ammunition

The Eleventh Court of Appeals' decision also errs in failing to consider any reasonable inferences from Appellant's purchase of a rare caliber of ammunition hours before Michele went missing.

About three hours before Michele disappeared, Appellant purchased .32 caliber ammunition. R.R. Vol. 6, pp. 32, 76-79, 168-79. The Eleventh Court of Appeals dismissed this piece of evidence and gave it no value at all, because "…the record does not indicate that Appellant actually obtained the gun…" *See Bush*, 2016 WL 4385896, at *6.

However, evidence was presented that: (1) a few weeks prior to September 10th Appellant had made inquiries into the whereabouts of a .32 caliber gun; (2) Appellant lied to law enforcement about buying the bullets; (3) the day Michele went missing, Appellant traveled all the way from his home in San Angelo to Brown County to purchase the bullets; (4) Michele had not been shot; and (5) every other act Appellant did on September 10th related to his plan for revenge. R.R. Vol. 4, pp. 53-54; R.R. Vol. 6, pp. 32, 76-79, 168-84; R.R. Vol. 7, pp. 82, 103, 105, 111-12.

A reviewing court must take care not to use a "divide and conquer" method of analysis where it separates out each piece of evidence offered and then speculates on evidence not offered. *Merritt v. State*, 368 S.W.3d 516, 526 (Tex. Crim. App. 2012).

A court of appeals should also consider the combined and cumulative force of the evidence. *Id.* at 526. This is true even in a circumstantial evidence case. *Temple v. State*, 390 S.W.3d 341, 359 (Tex. Crim. App. 2013).

The court of appeals' reasoning is a classic example of dividing and conquering the evidence. The court "divided" the evidence of Appellant's purchase of a specific type of ammunition from the rest of the evidence that gave significance to the purchase. The court then "conquered" the evidence of the bullets by speculating on evidence the State did not present, i.e. whether Appellant was able to acquire the gun he had been inquiring about previously.

However, while there was not direct evidence offered at trial that Appellant did acquire the gun, looking at the combined and cumulative impact of all of this evidence, a juror could rationally believe that Appellant would not have taken the time *on the very day Michele went missing* to *go out of town* to buy a *specific, rare caliber* bullet if he had not been able to locate the gun he had been inquiring after. This likelihood of this conclusion is supported by Appellant's lies about purchasing the bullets to law enforcement. A rational juror could believe that if

Appellant had bought the bullets for target practice or some other legitimate purpose, he would not have lied about his purchase.

This conclusion is even further strengthened in light of the court of appeals holding that the evidence was sufficient to support Appellant's conviction for murder. *See Bush*, 2016 WL 4385896, at *8. If the evidence allows a juror to rationally believe that Appellant murdered Michele even though Michele was not shot, yet Appellant purchased bullets a few hours before the murder, this supports the inference that Appellant used the bullets for some purpose other than to shoot. The most likely thing bullets can be used for other than shooting people is being placed into a gun which is then pointed at someone while abducting them.

While a rational person could disagree, overturning a conviction simply because rational disagreement exists is error. It certainly cannot be said that a juror would be irrational in light of this evidence to believe that Appellant had acquired the gun. If a juror could rationally believe this, then the conviction should be affirmed. *See Cavazos v. Smith*, 132 S.Ct. 2, 4 (2011); *Merritt v. State*, 368 S.W.3d 516, 527 (Tex. Crim. App. 2012); *Wirth v. State*, 361 S.W.3d 694, 698 (Tex. Crim. App. 2012).

Knock Out Drugs

The Eleventh Court of Appeals also did not consider the rational inferences that arise from Appellant's focus on knock out drugs or drops. Appellant conducted internet searches the internet for the words:

- knock out drops unconscious fast;
- natural knock out drop;
- homemade knock out drops;
- household knock out drug;
- over the counter knock out drugs;
- over the counter knock out drops;
- how to make homemade knock out drops; and
- will Visene in drink knock you out. R.R. Vol. 6, pp. 148-151; R.R. Vol. 9, State's Exhibits 44-51.

The court of appeals acknowledge as much in its opinion. *See Bush*, 2016 WL 4385896, at *5-6. However, the court dismissed this evidence because the internet searches occurred two months before Michele disappeared and there was no evidence presented that "Appellant purchased, made, or obtained these drugs." *See id.* at 6.

The court erred again by dividing evidence of the internet searches away from other evidence that makes the internet searches far more ominous and portentous. Two days before Michele disappeared, Appellant left her a voicemail that said:

> …[Michele] needed to be really careful. She shouldn't go anywhere that night, that *there were people watching her*, that they were really bad people and that they were *the kind of people that would put drugs*

> *in her drink and would hurt her*…. R.R. Vol. 4, p. 93 (emphasis added).

The same night that Appellant left that voicemail, Appellant drove past the residence where Michele was living. R.R. Vol. 4, pp. 41-42. The reasonable inference from Appellant driving past Michele's residence *the very same day* that he left that voicemail is that Appellant was the person watching her. If Appellant was the kind of person who would watch her, then in light of the voicemail, a jury could rationally believe that he was one of the "bad people" who "put drugs in her drink." This inference is strengthened by the fact that Appellant was in fact the type of "bad person" who would hurt Michele so badly that he actually killed her.

A jury could rationally believe that if Appellant was a bad person who put drugs in Michele's drink that he did in fact kidnap her. Even assuming that Michele was not drugged through a drink, this evidence still supports a rational inference that Appellant kidnapped Michele in some manner.

The Eleventh Court of Appeals was again dismissive of the internet searches. It held that even if these searches could provide sufficient evidence to show that Appellant attempted to kidnap Michele, the internet searches were not sufficient to show an act that amounted to more than mere preparation.[7] *See Bush*, 2016 WL 4385896, at *6. However, the court does not consider whether the

[7] The State contests the properness of this holding in Ground Two.

combined force of this evidence is sufficient to show that Appellant did in actual fact kidnap Michele.

Appellant carried through half of his threat in the voicemail by killing Michele. A juror could rationally believe that he actually carried about both parts of the threat, even without any evidence that Appellant purchased, made or obtained the homemade knock out drugs. Appellant's internet searches show that he was actively finding out how to make some type of drop that could incapacitate someone. It is rational to believe that Appellant could have found information on household items, such as Visene, that are readily available in a home that would have knocked Michele out and allowed him to kidnap her.

As this conclusion is not so irrational that no trier of fact could believe it beyond a reasonable doubt, the court of appeals should have affirmed Appellant's capital conviction.

Speculation on Evidence Not Offered & Speculating on a Hypothesis Inconsistent with Guilt

The Eleventh Court of Appeals does correctly point out in its decision that a time of death, cause of death, and location of death could not be ascertained in this case. *See id*. However, the court uses this fact inappropriately to then speculate on two theories that would be inconsistent with Appellant's guilt, such as: (1) whether

Michele was killed at the sports complex; and (2) whether Michele willingly left the sports complex with Appellant.

Rather than use these unknown facts to engage in speculation, the Court should have begun with the State's theory of the case and asked if the evidence would have supported that theory.

Both the Supreme Court and the Court of Criminal Appeals have clearly rejected the analytical construct that a conviction can only be upheld if every other reasonable hypothesis raised by the evidence was negated save and except the guilt of the defendant. *See Holland v. U.S.,* 348 U.S. 121, 139-40 (1954)*; Jackson v. Virginia,* 443 U.S. 307, 326 (1979)*; Ramsey v. State,* 473 S.W.3d 805, 808 fn.3 (Tex. Crim. App. 2015).

This Court has recently reaffirmed this position in *Cary v. State*. This Court held in *Ramsey* that beyond a reasonable doubt does not require the State to disprove every conceivable alternative to a defendant's guilt. *Ramsey v. State,* 473 S.W.3d 805, 808 (Tex. Crim. App. 2015). In *Cary*, this Court also stated that the requirement that the State prove each essential element of an offense beyond a reasonable doubt does *not* obligate the State to disprove every innocent explanation of the evidence before a jury can find a defendant guilt. *Cary v. State,* --- S.W.3d ---, 2016 WL 7856535, at *3 (Tex. Crim. App. Dec. 14, 2016).

The State's theory of the case was that: (1) Appellant somehow lured Michele to the sports complex; (2) that once she was at the complex, he used the .32 caliber gun or some other form of coercion to moving Michele to his pickup or confining Michele in his pickup as he is driving down the road; or (3) some combination of those two methods. *See* R.R. Vol. 8, pp. 36-38, 52.

As long as the evidence is sufficient to support the State's theory of the case, Appellant's conviction should be affirmed even though it may be hypothetically possible that Appellant murdered Michele the moment she arrived at the sports complex[8] or that Michele willingly left the sports complex with Appellant.[9]

[8] The State would point out that even though it does not have a burden to disprove this theory, there is evidence in the record that Appellant did not kill Michele immediately upon her arrival to the sports complex. There were no signs of a struggle or blood from an assault in or around Michele's car. *See Bush v. State*, No. 11-14-00129-CR, 2016 WL 4385896, at *4 (Tex. App.—Eastland Aug. 11, 2016, pet. granted) (Mem. Op., not designated for publication); R.R. Vol. 5, pp. 64-69. Appellant conducted a google search the day after Michele went missing about where the heart and lungs were located in the human body. *See* State's Exhibit 62. Appellant had refrigerant in his truck that could be used to cause a loss of consciousness in someone if inhaled. R.R. Vol. 6, pp. 31-32. A blue robe belt, that could have easily been used to tie someone up, was located in Appellant's pickup truck. *See* R.R. Vol. 6, p. 35; R.R. Vol. 8, p. 47. Additionally, the cell phones of Appellant and Michele were located together at the sports complex at 6:33 p.m. R.R. Vol. 7, pp. 24-26. However, by 6:40 p.m., the phones had already begun moving in the direction of the location where Michele was buried. R.R. Vol. 7, pp. 25-26. In order for Michele to have been killed at the sports complex, she would have had to have been killed almost immediately upon arrive. However, in light of Appellant's statements about wanting to make Michele suffer, a rational juror could infer that Appellant would not have killed Michele quickly.

[9] Like footnote 9, the State believes that even though it does not have a burden to disprove this theory, all of the evidence of the state of the relationship between Appellant and Michele would support the inference that Michele would not willingly leave the sports complex with Appellant.

The evidence does support the State's theory that Appellant lured Michele the sports complex. The court of appeals' decision acknowledges that during Appellant's interview with law enforcement, Appellant admitted that he had not brought the computer he promised to return to Michele with him on September 10th. *See Bush*, 2016 WL 4385896, at *7. However, the court dismissed this evidence because no evidence had been presented that Appellant had left the other items he promised to return at his house. *See id*.

Not only does this analysis speculate on evidence not offered and on a hypothesis inconsistent with Appellant's guilt, it also fails to resolve conflicting inferences in favor of the State and usurps the role of the factfinder.

While there was affirmative evidence that Appellant lied to Michele to try to meet with her, there could also be an inferences that he did not completely lie based upon a lack of evidence. However, an appellate court should presume that the trier of fact resolved this conflict by presuming that the jury determined that Appellant did lure Michele to the sports complex with false promises to return property that he had no intention of returning. *See Cavazos v. Smith*, 132 S.Ct. 2, 4 (2011).

Further, the jury listened to the recorded interview and determined how much of Appellant's statements they believed. The Court of Appeals relied in its dismissal of this evidence on the things Appellant told law enforcement during this

interview. *See Bush*, 2016 WL 4385896, at *7 ("…the computer was not the only item that Appellant told police he was trying to return to [Michele]. Appellant also told police that he was going to return a jacket, a camera, and a "chip" or SIM card for a cell phone.").

However, the jury had a right to determine the credibility of Appellant's statements in that interview. For the reviewing Court to use his statements as proof of the truth of what Appellant asserted usurped the jury's ability to determine what portions of that statement, if any, they found credible.

Summary

Sufficiency of the evidence rules are discussed repeatedly and frequently in appellate decisions. Absent consistent reminders, courts face constant temptation to allow familiarity to breed contempt for the limited role of an appellate analysis in a sufficiency review.

Presiding Judge McCormick wrote the majority decision for an en banc court in *Matson v. State*. It is worth noting that Judge McCormick twice cited to a lengthy quote from *Moreno v. State* within the *Matson* decision. *See Matson v. State*, 819 S.W.2d 839, 843 & 846 (Tex. Crim. App. 1991) (en banc). Very tellingly, that quote is an eloquent and thoughtful reminder of this limitation on

appellate courts during a sufficiency review. This Court, in assessing the Eleventh Court of Appeals' decision in this case, should remain cognizant of this caution:

> The court is never to make its own myopic determination of guilt from reading the cold record. It is not the reviewing court's duty to disregard, realign or weigh evidence. This the factfinder has already done. The factfinder, best positioned to consider all the evidence firsthand, viewing the valuable and significant demeanor and expression of the witnesses, has reached a verdict beyond a reasonable doubt. Such a verdict must stand unless it is found to be irrational or unsupported by more than a "mere modicum" of the evidence, with such evidence being viewed under the Jackson light. *Moreno v. State,* 755 S.W.2d 866, 867 (Tex. Crim. App. 1988) (en banc); *See also Turro v. State,* 867 S.W.2d 43, 47-48 (Tex. Crim. App. 1993) (en banc) (quoting *Moreno*); *Matson v. State,* 819 S.W.2d 839, 843 & 846 (Tex. Crim. App. 1991) (en banc).

In light of the jury's evaluation of the demeanor and credibility of the witnesses in this case and their alignment and weight afforded to the evidence, this Court should reverse the Eleventh Court of Appeals' decision as it relates to the sufficiency of the evidence to support the capital allegation and affirm Appellant's conviction for capital murder.

ARGUMENT & AUTHORITIES – GROUND TWO

The public policy served behind a sufficiency review is to ensure that a defendant receives the minimum that due process requires: a meaningful opportunity to defend against the charge against him and a jury finding of guilt beyond a reasonable doubt. *See Musacchio v. U.S.*, 136 S.Ct. 709, 715 (2016). All that a defendant is entitled to on a sufficiency challenge is for the court to make a "legal" determination whether the evidence was strong enough to reach a jury at all. *Id*.

The Supreme Court has even used language such as "…whether the finding [of guilt] was so insupportable as to fall below the threshold of *bare rationality"* when describing a *Jackson* review. *See Coleman v. Johnson*, 132 S.Ct. 2060, 2065 (2012) (emphasis added).

In light of this public policy, the Eleventh Court of Appeals' decision to find the evidence insufficient to support the allegation of attempted kidnapping falls well outside the realm of an appropriate sufficiency review.

The State argued to the Eleventh Court of Appeals that even if the evidence was insufficient to support a conclusion that Appellant kidnapped his victim, the evidence would still be sufficient to support a belief that Appellant attempted to kidnap his victim. *Bush*, 2016 WL 4385896, at *6.

However, the court rejected this argument because it believed that several significant pieces of evidence involved acts that did not amount to more than mere preparation. *Id.* at *6-7. The decision explicitly held that researching how to get knock out drops on the internet, purchasing ammunition, and setting up a meeting with the victim did not amount to more than mere preparation. *Id*. at *6.

This conclusion was erroneous. A reviewing court should not reject a jury verdict on sufficiency grounds simply because an appellate court disagrees with the jury's determination that an act amounts to more than mere preparation, particularly not in a circumstantial evidence case involving attempted kidnapping.

Criminal attempt involves an "imaginary line" that separates "mere preparatory conduct," which is usually non-criminal, from "an act which tends to effect the commission of an offense," which is always criminal conduct. *Flourney v. State,* 668 S.W.2d 380, 383 (Tex. Crim. App. 1984) (en banc).

The intent of Section 15.01 was not to draw this imaginary line at the "last proximate act" prior to the completion of the intended offense. *McCravy v. State,* 642 S.W.2d 450, 460 (Tex. Crim. App. 1980) (Opinion on State's Motion for Rehearing). Furthermore, the criminal attempt statute does not require that every act short of actual commission be accomplished in order for one to be convicted of an attempted offense. *Cody v. State,* 605 S.W.2d 271, 273 (Tex. Crim. App. 1980).

Therefore, there is necessarily a "gray area" between an allegation of a situation in which is clearly no more than mere preparation, and an allegation of a situation in which the accused is discovered clearly engaged in the last act prior to the completion of the intended offense. *McCravy*, 642 S.W.2d at 460.

In this case, the jury rejected a lesser-included instruction for murder after being properly instructed that to do so it must find that Appellant committed an act that amounted to more than mere preparation to attempt kidnap the victim. *See* C.R. pp. 99, 101-02, 107.

The jury's guilty verdict indicates that they chose to place Appellant on the criminal side of that imaginary line.

Were the issue raised on appeal purely a legal argument instead of a sufficiency review, the court of appeals could properly draw the imaginary line in a variety of places. *See Molenda v. State*, 715 S.W.2d 651, 652-53 (Tex. Crim. App. 1986) (en banc) (considering whether the indictment was fundamentally defective to allege an offense); *McCravy,* 642 S.W.2d at 451-52 (considering whether the indictment was fundamentally defective for failing to give adequate notice).

However, while *Molenda* and *McCravy* provide a helpful understanding of the law of criminal attempt, the basic issues involved in *Molenda* and *McCravy*

were vastly different from the sufficiency of the evidence review involved in this case.

The sufficiency of an *indictment* is a question of law. *State v. Moff,* 154 S.W.3d 599, 601 (Tex. Crim. App. 2004) (emphasis added).[10] Under *Moff,* an appellate court should conduct a *de novo* review of the sufficiency of the indictment. *Id*.

On the other hand, as referenced throughout Ground One of this brief, the standard of review for the sufficiency of *evidence* is far different.

The Eleventh Court of Appeals' error flowed from its treatment of the issue of whether Appellant's actions amounted to more than mere preparation as though it was reviewing the sufficiency of the *indictment* rather than the sufficiency of the *evidence*. The difference between these issues should compel a reviewing court to handle them differently.[11]

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[10] *See, e.g., Flores v. State,* 245 S.W.3d 432, 437 (Tex. Crim. App. 2008) (holding that a pre-trial motion such as a motion to quash an indictment is to address issues that can be determined before there is a trial on the general issue of the case); *Lawrence v. State,* 240 S.W.3d 912, 916 (Tex. Crim. App. 2007) (holding that a pretrial motion such as a motion to quash cannot be used to argue that the prosecution could not prove one element of the crime); *Woods v. State,* 153 S.W.3d 413, 415 (Tex. Crim. App. 2005) (holding that "the statutes that authorize pre-trial proceedings do not contemplate a 'mini-trial' on the sufficiency of the evidence to support an element of the offense"); *State v. Rosseau,* 398 S.W.3d 769, 779 (Tex. App.—San Antonio 2011) *aff'd* 396 S.W.3d 550 (Tex. Crim. App. 2013).

[11] *See, e.g., Labelle v. State,* 720 S.W.2d 101, 110-111 (Tex. Crim. App. 1986) (en banc) (Onion, J., dissenting) (noting that the adequacy of an indictment must be tested by its own terms and not with reference to the evidence offered at trial); *Royster v. State,* 622 S.W.2d 442, 443 (Tex. Crim. App. 1981) (noting that whether evidence supports allegations contained in the indictment cannot be tested by a motion to quash); *Tinker v. State,* 179 S.W. 572, 574 (1915) (holding that

Numerous courts have deferred to the factfinder in this gray area when concluding that the evidence is sufficient for a fact finder to determine that acts amounted to more than mere preparation.[12]

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an indictment must be tested by itself under the law as a pleading which cannot be supported or defeated by evidence introduced at trial).

[12] *See Santellan v. State,* 939 S.W.2d 155, 160-67 (Tex. Crim. App. 1997) (en banc) (finding the evidence both legally and factually sufficient to support a capital murder conviction alleging attempted kidnapping as the capital enhancement when the defendant claimed that he did not do any act that amounted to more than mere preparation to kidnap the victim prior to killing the victim); *Cody,* 605 S.W.2d at 273 (affirming a conviction for attempted arson after considering whether the evidence was sufficient to show an act amounting to more than mere preparation); *Flourney,* 668, S.W.2d at 383 (finding the evidence sufficient to support a conviction for attempted burglary of a habitation when the defendant challenged sufficiency of whether the evidence showed an act that amounted to more than mere preparation); *Farris v. State,* --- S.W.3d ---, 2016 WL 4578922, *3 (Tex. App.—Corpus Christi Sept. 1, 2016, pet. ref'd) (affirming a conviction for attempted indecency when a defendant claimed the evidence was insufficient to find that his actions amounted to more than mere preparation); *Adekeye v. State,* 437 S.W.3d 62, 68-70 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd) (affirming a conviction for attempted aggravated robbery when a defendant claimed that no evidence showed that he committed an act amounting to more than mere preparation); *Henson v. State,* 173 S.W.3d 92, 102-03, 105 (Tex. App.—Tyler 2005, pet. ref'd) (affirming conviction for attempted indecency with a child when the defendant claimed that the evidence was insufficient to show that he did an act amounting to more than mere preparation); *Come v. State,* 82 S.W.3d 486, 489-90 (Tex. App.—Austin 2002, no pet.) (affirming conviction for attempted aggravated sexual assault of a child when the defendant claimed that the evidence was not legally sufficient to support the conviction because his conduct amounted to no more than mere preparation); *Sorce v. State,* 736 S.W.2d 851, 857 (Tex. App.—Houston [14th Dist.] 1987, pet. ref'd) (affirming a conviction for attempted theft after considering whether the evidence was sufficient to show that the overt acts amounted to more than mere preparation); *Easter v. State,* No. 01-14-00450-CR, 2016 WL 4536462, at *9-11 (Tex. App.—Houston [1st Dist.] Aug. 30, 2016, no pet. h.) (Mem. Op., not designated for publication) (affirming a conviction for attempted theft by deception from a non-profit organization when a defendant claimed that the evidence was not sufficient to prove beyond a reasonable doubt that his acts amounted to more than mere preparation); *In re V.R.*, No. 10-09-00293-CR, 2010 WL 966168, at *1-3 (Tex. App.—Waco Mar. 10, 2010, no pet.) (Mem. Op.) (explicitly commenting that the court of appeals was giving due deference to the factfinder's determination when holding that the evidence was sufficient to support a conviction for attempted aggravated assault when the act amounting to more than mere preparation was picking up a knife); *Newman v. State,* No. 05-05-01139-CR, 2006 WL 1126196, at *1, 3-5 (Tex. App.—Dallas Apr. 28, 2006, no pet.) (not designated for publication) (affirming a conviction for attempted aggravated sexual assault of a child after a challenge to

The standard of review for sufficiency of evidence virtually demands such respect for the juror's assessment of the evidence on this particular issue.

The reviewing court is not to assess the evidence as a "thirteenth juror." *Runningwolf v. State,* 360 S.W.3d 490, 494 (Tex. Crim. App. 2012). Therefore, the Eleventh Court of Appeals framed its entire discussion of whether the evidence was sufficient to show that Appellant attempted to kidnap Michele incorrectly. The Court held without any reasoning or supporting that:

> Even if internet research, purchasing ammunition for a gun that the evidence does not show that Appellant possessed, and setting up a meeting in a public parking lot indicates that Appellant wanted to kidnap Reiter, these acts do not go beyond mere preparation. *Bush,* 2016 WL 4385896, at *6.

The Court does not cite to any authority for this conclusion and does not provide any articulable support for reaching this conclusion. *See id.*

Without any authority for such a holding and absent any articulable other reason, the Eleventh Court of Appeals acted as a thirteenth juror who has supplanted its opinion for that of the jurors who were instructed on and considered the very same issue.

Instead of making such a conclusory statement, the Court should have asked "Could any rational trier of fact believe beyond a reasonable doubt that conducting an internet search for knockout drugs, purchasing .32 caliber ammunition, creating

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the legal and factual sufficiency of the evidence to prove that the defendant's conduct went beyond mere preparation).

a facebook account for 'Rocky Switzer,' meeting Michele at the sports complex, or setting up a date between 'Rocky' and Michele amounted to more than mere preparation to kidnap Michele?". When the issue is thus framed properly, a reviewing court should find that the evidence was sufficient to show attempted kidnapping.

Because rational people can sometimes disagree, judges will sometimes encounter convictions that they believe to be mistaken, but that they must nonetheless uphold. *Cavazos v. Smith*, 565 U.S. 1, 2 (2011). If there was ever a area where rational people could disagree, a "gray area" of the law would surely be just such an area.

Even if this Court were to conclude that internet searches and purchasing ammunition did not rise to the level of more than mere preparation,[13] Appellant's action of creating a fake facebook account and inviting Michele on a date with "Rocky" goes far beyond those other actions.

The Eleventh Court of Appeals held that Appellant's action of setting up a date between the victim and "Rocky" did not amount to more than mere preparation because the meeting never occurred. *Bush*, 2016 WL 4385896, at *7.

However, the mere fact that a defendant could have taken further actions, without actually committing the offense, does not render actions nothing more than

[13] The State disagrees with this conclusion. However, for the sake of conciseness, the State has chosen to focus on the most blatant error committed by the court of appeals.

mere preparation. *Hackbarth v. State,* 617 S.W.2d 944, 946 (Tex. Crim. App. 1981).

Appellant, over the course of at least two months, engaged in a scheme of revenge that started with internet searches, but progressed steadily. While in July of 2012, Appellant had only conducted internet searches about "knockout drops," he did not stop with those actions. *See Bush*, 2016 WL 4385896, at *6.

The requirement that a defendant do acts that amount to more than mere preparation protects persons from being prosecuted for "mere thoughts, desires, or motives." *See U.S. v. Shelton,* 30 F.3d 702, 706 (6th Cir. 1994) (discussing the purpose of the federal burden of proof on the State to show that a defendant took a "substantial step"); *U.S. v. Ellis*, 564 F.3d 370, 374 (5th Cir. 2009) *cert denied* 558 U.S. 873 (2009) (discussing the federal requirement of an "overt act" as protection against punishment for "mere thoughts"). If the State had attempted to prosecute Appellant for just the actions in July of conducting an internet search, there would certainly have been a valid argument that this would be punishing him for mere thoughts of criminal activity.

However, Appellant's plan of revenge led him to the next level: inquiring about the location of a gun. Again, were these two facts viewed in isolation, there is a legitimate argument that his actions were still mere thought – although the strength of that argument has begun to erode. Then, yet again, on August 30th,

Appellant took another step in his plan: the creation of the "Rocky Switzer" facebook account and the friend request sent to Michele.

This progression shows Appellant moving well beyond simply thinking about getting revenge on Michele. Appellant has then created the means whereby he could lure her to a place where he could have access to her. To claim that Appellant was merely thinking about kidnapping and killing Michele at that point becomes a far more tenuous and difficult position to defend.

Yet the State's case still does not rest on only those facts. After the 30th, Appellant began communicating with Michele over facebook as the fictitious "Rocky." Although not all of the messages were recovered, the State presented hundreds of messages exchanged over a period of time about 48 hours prior to Michele's disappearance. *See* R.R. Vol. 9, State's Exhibit 43. These messages included "Rocky" saying:

- "I gotta go to Abilene today and do some training, after that could we meet?" [sic] (Sept. 10, 2012, 5:51:53 AM PDT);
- "ok then how about meeting at some park for take out. do you have parks" [sic] (Sept. 10, 2012, 5:56:36 AM PDT); and
- "just tell where and what the lastst you can be out" [sic] (Sept. 10, 2012, 5:57:19 AM PDT). R.R. Vol. 9, State's Exhibit 43.

The State believes, at a minimum, that these statements are certainly within the gray area of criminal attempt such that a jury's determination should be respected.

The Eleventh Court of Appeals rejection of these messages as more than mere preparation ignores two critical facts. First, the meeting never occurred because Appellant succeeded in using another means to access Michele prior to the meeting. However, the success of one method does not mean that he had not taken affirmative steps towards an alternate plan should the first method fail. Additionally, "Rocky" did not exist. Therefore, a "date" with "Rocky" could not ever occur.

In addition, it is critical to note that while the appellate courts and Appellant himself know that this was a false date with "Rocky," Michele did not know that it was not a real date. Michele was in fact in the very process of going to meet a person she truly believed was named "Rocky" for a date.

Furthermore, the evidence still did not stop with just the messages setting up the meeting. About seven hours later,[14] Appellant purchased the .32 caliber bullets. At that point in time, functionally the only thing left of Appellant's revenge plan is for him to meet, kidnap, and kill Michele. In determining whether a rational juror could believe that this timeline could reflect actions amounting to more than mere preparation, several things should be noted:

[14] The facebook messages would have been sent around 8 a.m. Central Time. Appellant went to the store at 3:13 p.m. *See* R.R. Vol. 6, p. 32, 76-79, 168-79.

(1) As conduct amounting to more than mere preparation does not have to be drawn at the last proximate act, any number of places along this timeline would be sufficient to show more than mere preparation;

(2) Completing every step necessary to use the gun or "knockout drops" by setting up a meeting and purchasing the ammunition brought Appellant to the very act of the last proximate act – the actual kidnapping;

(3) Had the police been present at the sports complex and arrested Appellant there solely for attempted kidnapping, it would be very difficult to argue that he had *not* done an act amounting to more than mere preparation – the very act of seeking out physical proximity to your target after all of those actions is itself an act amounting to more than mere preparation; and

(4) Appellant did more than simply *contemplate* kidnapping Michele – once he and Michele were at the same physical location, the *danger* of a completed criminal offense of kidnapping was imminent and all that remained was in fact the last proximate act.

Failure to recognize the facts results in an appellate decision that eviscerates the possibility of proving an attempted kidnapping case through circumstantial evidence.

Absent direct testimony of an eyewitness, there is very little additional circumstantial evidence that could exist to show an attempted kidnapping besides what was offered. The State provided evidence of motive, specific intent to kidnap (through internet searches and Appellant's own use of the word "abduction"), opportunity, means, plans, and actions to put those plans into place. If this case does not provide enough evidence to rise about a standard of "bare rationality" such that a jury should be allowed to make the ultimate determination, the State cannot imagine a case that would.

At a minimum, the jury's determination that Appellant did an act which amounted to more than mere preparation was certainly not so outrageous that no trier of fact could agree. Simple disagreement over where the line falls delineating criminal action from innocent action in this "gray area" should be left to the factfinder and an appellate court should not substitute their own judgment. Therefore, the Eleventh Court of Appeals erred in finding the evidence insufficient to support the capital allegation.

PRAYER FOR RELIEF

The State therefore respectfully requests that this Court reverse the Eleventh Court of Appeals decision to find the evidence insufficient to support the capital

allegation. The State asks that this Court therefore reinstate Appellant's conviction for Capital Murder.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing brief was mailed to Emily Miller, Attorney at Law, 707 Center Avenue, Brownwood, Texas 76801, on the 10th day of February, 2017.

/S/ ELISHA BIRD
ELISHA BIRD

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing brief was mailed to Lanny M. Bush, Michael Unit, 2664 FM 2054, Tennessee Colony, Texas 75886, on the 10th day of February, 2017.

/S/ ELISHA BIRD
ELISHA BIRD

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing brief was emailed to Stacey Soule, State Prosecuting Attorney, at Stacey Soule Stacey.Soule@SPA.texas.gov, on the 10th day of February, 2017.

/S/ ELISHA BIRD
ELISHA BIRD

CERTIFICATE OF COMPLIANCE

This document complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been prepared in a conventional typeface no smaller than 14point for text and 12-point for footnotes. This document also complies with the word-count limitations of Tex. R. App. P. 9.4(i), if applicable, because it contains 11,030 words, excluding any parts exempted by Tex. R. App. P. 9.4(i)(1).

/S/ ELISHA BIRD
ELISHA BIRD

APPENDIX

Opinion filed August 11, 2016

In The

Eleventh Court of Appeals

No. 11-14-00129-CR

LANNY MARVIN BUSH, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 42nd District Court

Coleman County, Texas

Trial Court Cause No. 2602

MEMORANDUM OPINION

The jury convicted Lanny Marvin Bush of capital murder for the kidnapping and murder of Michele Monique Reiter. The court assessed Appellant's punishment at confinement for life without parole and sentenced Appellant accordingly. Because we hold that there is insufficient evidence to support a conviction for capital murder based on kidnapping, we reverse. However, because we find that the

evidence is sufficient to support the lesser included offense of murder, we remand this cause to the trial court to reform the judgment to reflect a conviction of murder and to conduct a new trial as to punishment only.

Reiter lived with her roommate, Denise "Denny" Worrell, in Brownwood. Reiter did not come home one night after she left for a dinner that she had planned with someone whom Reiter believed was a friend from school. Police later found Reiter buried in a shallow grave in Coleman County.

Appellant presents three issues for our review. In Appellant's third issue, he argues that the trial court erred when it denied his motion to suppress as it related to a video recording of his police interrogation. We review a trial court's ruling on a motion to suppress for an abuse of discretion, applying a bifurcated standard of review. *St. George v. State*, 237 S.W.3d 720, 725 (Tex. Crim. App. 2007). The bifurcated standard requires that we give great deference to the trial court's findings of historical facts supported by the record and to mixed questions of law and fact that turn on an evaluation of credibility and demeanor. *Herrera v. State*, 241 S.W.3d 520, 526–27 (Tex. Crim. App. 2007). However, we review de novo the trial court's determination of the law and its application of law to facts that do not turn on an evaluation of credibility and demeanor. *Id.* at 527; *Davila v. State*, 4 S.W.3d 844, 847–48 (Tex. App.—Eastland 1999, no pet.). We view the evidence in the light most favorable to the trial court's ruling. *Carmouche v. State*, 10 S.W.3d 323, 327 (Tex. Crim. App. 2000).

Custodial interrogation is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda v. Arizona*, 384 U.S. at 436, 444 (1966). The defendant bears the initial burden of proving that the statement is the product of

custodial interrogation. *Gardner v. State*, 306 S.W.3d 274, 294 (Tex. Crim. App. 2009). "[B]eing the 'focus' of an investigation does not necessarily render a person 'in custody' for purposes of receiving *Miranda* warnings or those required under article 38.22 of the Code of Criminal Procedure." *Id.* at 293. There are four general situations that may constitute custody for purposes of *Miranda* and Article 38.22: (1) the accused is physically deprived of his freedom of action in a significant way; (2) a police officer tells the accused he is not free to leave; (3) police officers create a situation that would lead a reasonable person to believe that his freedom of movement has been significantly restricted; and (4) there is probable cause to arrest the accused, and police officers do not tell him that he is free to leave. *Id.* at 294. Nevertheless, we consider the totality of the circumstances surrounding an interrogation to determine whether the person was in custody during the interrogation. *See Dowthitt v. State*, 931 S.W.2d 244, 255 (Tex. Crim. App. 1996) ("The determination of custody must be made on an ad hoc basis, after considering all of the (objective) circumstances."); *see also Blain v. State*, No. 11-12-00212-CR, 2013 WL 4052540, at *2 (Tex. App.—Eastland Aug. 8, 2013, no pet.) (mem. op., not designated for publication).

We have reviewed the video recording as presented to the jury. When Appellant first arrived in the interview room, Ranger Hanna and Appellant had a short, casual conversation. When Ranger Crawford came into the room, Ranger Hanna began to explain why Appellant was present and the expectations of the interview. The conversation proceeded as follows:

> RANGER HANNA: You didn't want to, I mean, you didn't want to talk to, to [officers with the Brownwood Police Department], but you're are okay with talking with us.
>
> APPELLANT: Yea, I'm okay with that.

RANGER HANNA: In fact, you've driven down here on your own.

APPELLANT: Right.

RANGER HANNA: Alright, and you understand right now we're not telling you you're under arrest, you're . . . not going to be free to, to leave right now. So this is like a voluntary interview is what we want to be clear on. You agree with that?

APPELLANT: Yes, Sir.

Appellant argues that the statement that Appellant was not free to leave shows that the interview was custodial. Appellant further argues that, because the rangers failed to Mirandize Appellant prior to the start of this questioning, the trial court erred when it denied Appellant's motion to suppress. However, we disagree that Ranger Hanna ever told Appellant that he was not free to leave. Although Ranger Hanna stumbled on his words, he expressed to Appellant that (1) he was *not* telling Appellant that he was under arrest and (2) he was *not* telling Appellant that he was not free to leave.

Even if Ranger Hanna told Appellant that he was not free to leave, several facts indicate that this video recorded interview was not custodial. First, Appellant requested to meet with the rangers. Second, Appellant drove himself and came with his girlfriend to the police station. Additionally, at the time that Ranger Hanna allegedly told Appellant that he was not free to leave, Ranger Hanna was quickly going over the voluntary aspect of the interview. This portion of the interview was less than thirty seconds. The entire conversation between the rangers and Appellant indicated that they all believed that Appellant was free to leave at any point during the interview. The rangers requested consent to search Appellant's laptop, cell

phone, and pickup. When the rangers discussed whether Appellant would consent to a search of these items, Appellant became concerned with whether the rangers would have time to search his pickup prior to work the next day. The rangers offered to provide him with transportation to work and to help him load his tools into the substitute vehicle. This conversation indicates that the rangers, as well as Appellant, believed that he was free to leave and could return to work the next day.

Moreover, Appellant asked to speak to his girlfriend to discuss the situation regarding his pickup. The rangers permitted Appellant's girlfriend to enter the interview room, discuss the situation with him, leave, and wait for Appellant in another room.

Appellant also argues that he requested an attorney and that the rangers ignored this request. A request for an attorney must be unambiguous. *Dowthitt*, 931 S.W.2d at 257. When Appellant first questioned his need for an attorney, Appellant was not talking to the rangers. Rather, Appellant and his girlfriend were discussing the possibility that he needed to talk to an attorney about the consent to search his pickup. This was not a specific, unambiguous request for an attorney. *See id.*

Finally, when Appellant did unambiguously request an attorney, the rangers ended all questioning and permitted Appellant to leave the interview room and the station. However, by the time that Appellant had made it outside the station, the rangers had decided to place him under arrest for online impersonation. At this time, the rangers read Appellant his *Miranda* rights, and Appellant voluntarily waived those rights. All these factors weigh against a determination that the initial portion of Appellant's interview was custodial. We find that the trial court did not err when it denied Appellant's motion to suppress. We overrule Appellant's third issue.

In Appellant's first issue, he argues that the evidence is factually insufficient to show that he was the person who committed the murder. In Appellant's second issue, he argues that the evidence is legally insufficient to support a conviction for capital murder because there is insufficient evidence of kidnapping. Under *Brooks v. State*, we no longer complete separate factual and legal sufficiency reviews. *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010); *Polk v. State*, 337 S.W.3d 286, 288–89 (Tex. App.—Eastland 2010, pet. ref'd). We review the sufficiency of the evidence, whether denominated as a legal or as a factual sufficiency claim, under the standard of review set forth in *Jackson v. Virginia*, 443 U.S. 307 (1979). *Brooks*, 323 S.W.3d at 912; *Polk*, 337 S.W.3d at 288–89. Under the *Jackson* standard, we examine all the evidence in the light most favorable to the verdict and determine whether, based on that evidence and any reasonable inferences from it, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 319; *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010). In our review, we will give deference to the duty of the factfinder to resolve credibility issues and to weigh the evidence. *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007).

Under Section 19.03(a)(2) of the Texas Penal Code, a person commits capital murder if "the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated sexual assault, arson, obstruction or retaliation, or terroristic threat." TEX. PENAL CODE ANN. § 19.03(a)(2) (West Supp. 2015). The State charged Appellant with intentionally causing the death of Reiter while in the course of committing or attempting to commit the offense of kidnapping.

Appellant and Reiter were romantically involved for approximately five years prior to her death. When Reiter ended her relationship with Appellant, she cut off almost all communication with him, but he continued to call and text her often. Appellant created a Facebook page under the name "Rocky Switzer" so that he could continue to communicate with Reiter by pretending to be someone with whom Reiter had previously gone to school. Reiter began to communicate with "Rocky Switzer" about relationships, including her former relationship with Appellant. At that time, Reiter was dating a married man, William Kemper Croft. Reiter agreed to have dinner with "Rocky Switzer." Reiter and "Rocky Switzer" planned to meet at 8:30 on the night she went missing. After they had made plans to meet, but before the scheduled meeting time, Appellant told Croft's wife about her husband's relationship with Reiter. Croft's extramarital affair with Reiter ultimately caused Croft and his wife to get a divorce.

Reiter told Worrell about her date with "Rocky Switzer," and Worrell testified that Reiter was looking forward to meeting with him. Worrell last saw Reiter at approximately 6:15 on the night she went missing. At around 7:56 that night, Worrell received the following text message from Reiter's phone: "Rock[y] called and is here early going to meet him will be home late." Worrell testified that this text message was strange because it was lengthy, because it was not typed in the style that Reiter typically communicated, because "Rocky" was not much earlier than planned, and because she already knew Reiter would be late. Worrell further testified that the conversation was strange because Reiter did not respond to Worrell's reply message. Worrell explained that she replied to the text and that she expected Reiter to respond back because Reiter was the type of person that had to

have the last word in a conversation. During Appellant's interview, Appellant admitted that he sent the text message to Worrell from Reiter's phone.

Reiter and Worrell had an agreement that, if Worrell did not hear from Reiter for a length of time, Worrell was to contact the police. When Reiter was not home by the next morning, Worrell reported her missing. Worrell testified that Reiter would not have met Appellant in a private location. Additionally, Yolanda Nino, Reiter's coworker, testified that Reiter was scared of Appellant. Appellant told Ranger Hanna and Ranger Crawford that Reiter wanted to meet him in a location that was not too public or too private. The police began to investigate, and Worrell called Appellant to see if he had any information on Reiter's whereabouts.

Appellant told Worrell that he had not seen Reiter, and he denied any knowledge of her whereabouts. Worrell and Appellant continued to have conversations through text messages about the investigation and what had happened to Reiter. At one point, in an effort to explain why he had caused difficulties for Reiter, Appellant told Worrell that "he just wanted to hurt [Reiter] as bad as she hurt him." Further, through a text message, Appellant told Worrell that he knew Reiter was alive and that she would come home when it all died down. After Reiter's disappearance, Appellant asked Worrell if he could look at Reiter's wardrobe to see if she took clothes with her. When Worrell told Appellant that the police had sealed the room, he asked if the police believed she had been abducted. Additionally, Worrell testified that prior to Reiter's disappearance, Appellant left Reiter a voicemail in which he said that bad people would put drugs in her drink and hurt her.

Phone records showed that, at 6:15 on the night that Reiter went missing, her phone was near her home, and Appellant's phone was at the Bert Massey Sports

Complex. At 6:17 p.m., there was a phone call between Reiter and Appellant that lasted for approximately three minutes. At approximately 6:30 that night, both Appellant's and Reiter's phones were at the sports complex, the location where Reiter's car was later found. The phone records further showed that, around 6:40 p.m., both phones were on a back road that ran south from Brown County to Santa Anna in Coleman County. Near 7:00 that night, cell tower records revealed that the phones were in the Bangs area, a path that continued along the back road toward Santa Anna. The records showed that the phones then reached the location where Reiter's body was found. In fact, these phone records were the means by which Reiter's body was found.

The phone logs further showed that Appellant's phone left the location of Reiter's burial site and returned to his home on the night Reiter went missing. However, Reiter's phone stopped communicating with phone towers at 8:55 on the night she went missing. The next morning, Appellant's phone communicated with phone towers within several miles of Reiter's burial site. Around this same time, Reiter's phone briefly communicated with towers near her burial site and then did not communicate with any towers again. Her phone was never located.

Reiter's car was found in the sports complex parking lot. There were no signs of a struggle in or near the vehicle. Reiter's unclothed body was found in a shallow grave under a bridge. According to the record, this location was concealed from the view of persons driving on the highway. Due to the decomposition of the body, the medical examiner, Dr. Marc Krouse, could not determine Reiter's cause of death. There were no stab wounds, no gunshot wounds, no evidence of natural disease, no evidence of strangulation, and no evidence of injury. Based on the autopsy,

Dr. Krouse could not rule out death by asphyxiation by snubbing or overlay, and he noted that there was strong evidence of foul play.

Before Reiter's disappearance, Appellant often called and often sent text messages to Reiter. According to what Appellant told the rangers, there was a time period after Reiter's disappearance when Appellant possessed her phone; Appellant made only a few calls to Reiter's phone during that time.

Ranger Hanna and Ranger Crawford interviewed Appellant before Reiter's body had been found. At first, Appellant told the police that he did not see Reiter on the day that she went missing. He admitted that he created "Rocky Switzer" and that the two had agreed to meet the night that Reiter went missing. However, he told the Rangers that the purpose of this meeting was for Reiter to get "stood up" by "Rocky Switzer." Later in the interview, Appellant admitted to meeting with Reiter on the date that she went missing, but before Reiter was scheduled to meet "Rocky Switzer." At one point in the interview, Appellant stated that he had had sex with Reiter that day and that they had talked about getting back together.

The record shows that a shovel was used at the burial site to move dirt onto Reiter's body. When the police searched Appellant's pickup, they found a shovel in the bed of his pickup. The record indicates that this was not something Appellant normally carried in his pickup. Ranger Hanna testified that the shovel was not swabbed and tested because it had rained since Reiter's disappearance. He explained that, because the shovel was in the bed of the pickup, he believed that any biological evidence would have been removed due to the rain. Ranger Hanna further testified that refrigerant was found in Appellant's pickup and that refrigerant can cause an individual to die by asphyxiation.

A search of Appellant's computer showed internet searches for information on drugs that can knock a person out. The searches included information on natural and over-the-counter "knockout drops." Appellant also searched for where the heart and the lungs were located in the human body. He searched for "[B]rownwood [T]exas police blotter" and "Missing Person Protocol." He further searched for information on how one could know whether someone was cheating on him and how to get over a breakup.

Appellant's daughter, Jennifer High, testified that Appellant contacted her on the night of Reiter's disappearance. During their conversation, Appellant stated that Reiter was missing and that her car was at the sports complex. This conversation occurred prior to the phone call that Worrell made to Appellant in which she told him that Reiter was missing.

Further, Appellant's nephew, Marvin Don Thompson, testified that, prior to Reiter's disappearance, Appellant asked Thompson which family member possessed a .32 caliber gun that had previously belonged to Thompson's late grandfather. On the day of Reiter's disappearance, Appellant purchased .32 caliber ammunition.

We first determine whether the State proved kidnapping—the aggravating element of capital murder as charged in this case. *See* PENAL § 19.03(a)(2). "A person commits the offense of kidnapping by intentionally or knowingly restricting a person's movements, by either moving the person from one place to another or confining the person, without consent." *Swearingen v. State*, 101 S.W.3d 89, 95 (Tex. Crim. App. 2003) (citing PENAL §§ 20.01(1)(A), (2)(A) & (B), 20.03(a)). This restriction of movement can be accomplished by force, intimidation, or coercion, so as to substantially interfere with the person's liberty. *Id.* The act or acts must be done with the intent to prevent the person's liberation by either secreting or holding

her in a place where she is not likely to be found or using or threatening to use deadly force. *Id.* Deadly force is "force intended or known by the person acting to cause, or in the manner of its use or intended use is capable of causing death or serious bodily injury." *Id.* "The offense of kidnapping is complete when the restraint is accomplished and there is evidence that the defendant intended to restrain the victim by either secretion or the use or threat to use deadly force." *Id.* (citing *Mason v. State*, 905 S.W.2d 570, 575 (Tex. Crim. App. 1995)).

The State argues that the following evidence is sufficient to show kidnapping: Reiter is dead; Reiter's body and car were found in remote locations; the route along which Appellant's and Reiter's phones were traced ran to the burial site and went through rural, remote locations; the autopsy noted a suggestion of foul play; asphyxiation by snubbing or overlay or death from exposure to refrigerant could not be ruled out; Appellant purchased .32 caliber ammunition and may have had access to a .32 caliber weapon; Appellant used the word "abduction" when talking about Reiter's disappearance with Worrell; Appellant left Reiter a voicemail in which he said that other individuals would "put drugs in her drink"; Reiter would not have willingly gone to a rural location; and there is no evidence that Reiter was murdered where her car was found. We disagree that this evidence shows that Appellant kidnapped Reiter.

The record does not provide the time or date of Reiter's death. The record does not indicate whether Reiter was alive at the time that phone records show that her phone and Appellant's phone signals left the sports complex on the night she went missing. Although the State argues that Reiter would not go with Appellant to a rural location—her burial site, the evidence shows that Reiter met with Appellant in a remote location—the sports complex. There is no evidence that the meeting at

the sports complex was against Reiter's will. Likewise, the record does not indicate whether Reiter left the sports complex willingly with Appellant or whether Reiter was even still alive when she left the sports complex. In addition, although the State argues that there is no evidence that Reiter was killed at the sports complex, there is also no evidence that Reiter was killed at the burial site or in Appellant's vehicle. Thus, without evidence that Reiter was moved from one place to another or confined without consent prior to her death, a rational juror could not believe beyond a reasonable doubt that Appellant kidnapped Reiter from the sports complex. *But cf. Valdez v. State*, No. 08-10-00331-CR, 2012 WL 4928905, at *1–2, 7–9 (Tex. App.—El Paso Oct. 17, 2012, pet. ref'd) (not designated for publication) (explaining that victim's voluntary accompaniment with defendant to his house did not preclude the possibility that a kidnapping subsequently occurred and holding that the evidence was sufficient to support the kidnapping element of a capital murder conviction where victim told police that she had been held against her will).

Additionally, a rational juror could not believe beyond a reasonable doubt that Appellant attempted to kidnap Reiter. A person commits attempted kidnapping when, with the specific intent to commit kidnapping, "he does an act amounting to more than mere preparation that tends but fails to effect the commission of the offense intended." PENAL § 15.01(a) (West 2011). The State argues that the following evidence indicates that Appellant attempted to kidnap Reiter: Appellant searched for knockout drugs or drops, how to get over a breakup, and how to know whether Reiter was cheating; Appellant left Reiter a voicemail that indicated that other people would put drugs in her drink; Appellant created a fake Facebook page to keep in contact with Reiter; and on the day of Reiter's disappearance, Appellant purchased ammunition for the same caliber gun to which he may have had access.

Our review of the evidence does not show that Appellant completed an act amounting to more than mere preparation as required by the Penal Code. *See id.* From our review of the computer forensic documents, it appears that the internet searches for knockout drugs are from July, two months prior to Reiter's disappearance. Moreover, there is no evidence that Appellant purchased, made, or obtained these drugs. Appellant purchased .32 caliber ammunition, but the record does not indicate that Appellant actually obtained the gun that he had mentioned to his nephew. Although the evidence shows that Appellant, as "Rocky," was to meet Reiter later for dinner, he, not as "Rocky" but as himself, met her at the sports complex two hours earlier than the scheduled meeting time. Therefore, the planned date never occurred. Even if internet research, purchasing ammunition for a gun that the evidence does not show that Appellant possessed, and setting up a meeting in a public parking lot indicates that Appellant wanted to kidnap Reiter, these acts do not go beyond mere preparation.

The evidence also does not support the State's theory that Appellant lured Reiter to a location from which he could kidnap her either by posing as "Rocky" or by promising that he would return her property. As we have discussed, the meeting with "Rocky" never occurred; thus, the planning of that meeting did not amount to an act beyond mere preparation.

At trial, the State also argued that Appellant lured Reiter to the sports complex by deception in that he told her that he was going to give some of her belongings back to her when he had no intention of returning her things. Although Ranger Hanna testified that Appellant admitted during the interview that he did not have the computer with him on the day that Reiter went missing, the computer was not the only item that Appellant told police he was trying to return to Reiter.

Appellant also told police that he was going to return a jacket, a camera, and a "chip" or SIM card for a cell phone. In his interview, Appellant told Ranger Hanna that he did not take the computer with him on the day that he was supposed to meet Reiter. He said that he never carried it with him and that he always left it at the house. Appellant did not tell Ranger Hanna that he left the other items at his house or that he otherwise did not have them with him on the day Reiter went missing. We have found no other evidence in the record that indicates that Appellant did not have the items with him. There is also no evidence of what Appellant told Reiter in the three-minute conversation prior to the time that Reiter met Appellant at the sports complex. Therefore, the record does not support the State's argument to the jury that Appellant lured Reiter to the sports complex by deception. *But cf. Martinez v. State*, No. 03-00-00581-CR, 2001 WL 223259, at *3 (Tex. App.—Austin Mar. 8, 2001, pet. ref'd) (not designated for publication) (holding that evidence was sufficient to support the kidnapping element of a capital murder conviction where the record showed that defendant lured the victim into the car under false pretenses by telling the victim that he needed her to help pick up a friend's car that did not exist).

We hold that the evidence is insufficient to show that Appellant kidnapped or attempted to kidnap Reiter. Thus, the evidence is insufficient to support Appellant's conviction for capital murder. We sustain Appellant's second issue.

Because we have found that the evidence is insufficient to support Appellant's conviction for capital murder as charged in the indictment, we must now decide whether the conviction should be reformed to reflect a conviction for a lesser included offense. *See Thornton v. State*, 425 S.W.3d 289, 300 (Tex. Crim. App. 2014). A conviction should be reformed when (1) every element necessary to prove

the lesser included offense was found when the appellant was convicted of the greater offense and (2) the evidence is sufficient to support a conviction for the lesser included offense. *Id.* First-degree murder is a lesser included offense of capital murder, and the jury necessarily found that Appellant intentionally or knowingly killed Reiter when it convicted him of the capital murder of Reiter. *See* PENAL §§ 19.02, 19.03. Therefore, we will review the evidence to determine whether it is sufficient to support a conviction for murder. *See Thornton*, 425 S.W.3d at 300, 307.

Appellant argues in his first issue that the evidence is factually insufficient to show that he is the person that murdered Reiter. Although we are no longer reviewing Appellant's argument as it relates to the capital murder, we believe his argument also applies to our consideration of the lesser included offense of first-degree murder. However, as we have stated, we will review Appellant's challenge to the factual sufficiency of the evidence as a challenge to the legal sufficiency of the evidence. *See Brooks*, 323 S.W.3d at 912; *Polk*, 337 S.W.3d at 288–89.

Appellant specifically argues that Croft, the married man whom Reiter was dating at the time of her death, had the motive to kidnap and murder Reiter; that there was no eyewitness testimony, fingerprint evidence, or DNA evidence linking Appellant to Reiter's murder; and that there was no evidence of a murder weapon or cause of death, much less any evidence to link Appellant to a weapon. Even though we agree with Appellant's assertions regarding a lack of forensic evidence linking Appellant to the murder, we do not agree that other evidence, including circumstantial evidence, is insufficient to link Appellant to Reiter's murder.

The evidence shows that Appellant had the opportunity to murder Reiter. His phone and her phone were in the same locations throughout the evening of her disappearance, and the last place for which her phone provided location data was the

location where her body was found. The records indicate that Appellant's phone signal showed a return to his home in San Angelo between 11:00 p.m. and midnight that night but that Reiter's phone did not communicate again with any towers after 8:55 p.m. The next morning, Appellant's phone communicated with phone towers within several miles of Reiter's burial site. Around this same time, Reiter's phone briefly communicated with towers near her burial site and then did not communicate with any towers again. Thus, the record supports a reasonable inference that Appellant was the last person to see Reiter alive and that Appellant returned to Reiter's burial site the next morning. In addition, Detective Brian Tompkins of the Brownwood Police Department testified that he ruled out Croft as a potential suspect because the cell phone records showed that Appellant's and Reiter's phones were in the same locations throughout the night of her disappearance.

Further, Appellant had a difficult time dealing with his breakup with Reiter. This difficulty was evident from his conversations with Reiter as "Rocky Switzer" and his internet searches that included how to get over a breakup. "Rocky" told Reiter multiple times that he was having a hard time getting over his most recent ex-girlfriend. And Appellant told Worrell that he wanted to hurt Reiter as bad as she hurt him.

Finally, although Dr. Krouse could not determine Reiter's cause of death, he did determine that, based on the circumstances surrounding her death, there was strong evidence of foul play. Dr. Krouse also testified that he could not rule out asphyxiation. Ranger Hanna testified that refrigerant was found in Appellant's pickup and that it could cause death by asphyxiation. From this evidence, we find that a rational jury could have found beyond a reasonable doubt that Appellant

murdered Reiter. *See Jackson*, 443 U.S. at 319; *Isassi*, 330 S.W.3d at 638. We overrule Appellant's first issue.

Appellant's judgment of conviction for capital murder is reversed. We remand this cause to the trial court to reform the judgment to reflect a conviction for the offense of murder and to conduct a new trial as to punishment only. *See Thornton*, 425 S.W.3d at 300, 307.

JIM R. WRIGHT
CHIEF JUSTICE

August 11, 2016

Do not publish. *See* TEX. R. APP. P. 47.2(b).

Panel consists of: Wright, C.J.,
Willson, J., and Bailey, J.